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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 3, 2003

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W. Room 8-B201
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991
CG Docket No. 02-278, FCC 03-62; 68 FR 16250 (April 3, 2003)

Dear Mr. Chairman:

America's Community Bankers ("ACB")¹ appreciates the opportunity to reply to comments the Federal Communications Commission (the "Commission") received in opposition to the pending Petition for Reconsideration before the Commission on the telemarketing rulemaking (the "Rulemaking")² under the Telephone Consumer Protection Act ("TCPA")³.

Background

ACB was among the Financial Services Coalition members, which, on August 25, 2003, filed a Petition for Reconsideration and Clarification to the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (the "Petition"). In our Petition, we maintained that the Commission's new unsolicited facsimile advertisement rules ("do not fax rules") are contrary to the public interest because they would significantly disrupt the manner in which financial institutions conduct their mortgage and other lending businesses by eliminating the established business relationship ("EBR") exception and imposing burdensome changes to the available methods by which financial institutions handle the processing of various loan information and loan document requests.

¹ America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than \$1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² CG Docket No. 02-278, FCC 03-62; 68 Fed. Reg. 16250 (April 3, 2003).

³ Pub. L. No. 102-243, Telephone Consumer Protection Act of 1991.

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ACB members collectively originate approximately 25 percent of the nation's residential mortgage loans, and more than half of mortgages originated by depository institutions. Community banks help Americans gain access to home ownership, which helps communities throughout the country expand and continue to grow. As described more fully below, the Rulemaking would disrupt in significant ways, with no counterbalancing benefit to consumers, the operation of these important sources of residential housing credit.

ACB Position on "do not fax rules"

In addition to the comments in our Petition, we urge the Commission to clarify the definition of the term "advertise the commercial availability of goods and services" in the do not fax rule. We believe that this term should be defined with much greater precision and that the scope of the term be narrowed.

Like many businesses, residential mortgage lenders, including many ACB members, rely heavily on facsimiles to communicate with their business partners, including mortgage brokers, loan correspondents, real estate brokers, home builders, mortgage insurance companies, hazard insurance companies, outsource service providers, appraisers, title insurance companies, real estate settlement providers and other providers of real estate services. The efficient flow of information among these entities is vital to the operation of a nationwide residential housing finance marketplace. These businesses need the information that ACB members distribute several times during each business day via fax in order to effectively bring together interested lenders and borrowers.

ACB members use faxes extensively in their wholesale lending operations to distribute interest "rate sheets" to the mortgage brokers and correspondents that bring them loans. These rate sheets list the full range of loan products mortgage lenders are willing to purchase or fund and at what prices. Mortgage brokers and correspondents use these rate sheets to quote rate and product information to consumers, and to real estate brokers, homebuilders and others.

These informational faxes announce "commercial availability" in only the most technical sense of the term. The central purpose of these types of faxes is to assure that the data necessary to the operation of a functioning competitive marketplace in the financial service sector is readily, quickly and widely available so that the ultimate consumers of these services have the information they need to make informed decisions. There is no sound justification in law or policy to subject these types of faxes to a complex and costly regulatory regime.

The term "advertise the commercial availability" should apply only to faxes that directly and explicitly urge the purchase or rental of goods or services or involve some form of comparative advertising.

Finally, regarding the "do not fax" rule, we urge the Commission to make clear that its definition and requirements supercede and preempt any inconsistent state and local rules. It would be counterproductive to subject financial service providers or other marketers to a patchwork of state laws and regulations.

ACB position on Telephone Marketing Rules

ACB also urges the Commission to resolve the jurisdictional conflicts between the FCC's rules and regulations implementing the Federal Trade Commission's ("FTC") Telemarketing Sales Rule⁴ (the "FTC Telemarketing Rule"). The Commission can resolve the conflict by asserting its exclusive jurisdiction, provided by the Federal Communications Act, over the uses of the public switched network and equipment interconnected with that network. This assertion of exclusive jurisdiction would mean that all marketers, including all financial services companies (regardless of regulatory status under federal or state law), would be subject only to the FCC regulations regarding call abandonment and the mandatory transmission of Caller ID. This would put all financial service companies on the same footing under the FCC rules and the rules would be applied consistently both to banks and third parties who conduct telemarketing on behalf of banks.

Conclusion

ACB believes that the Commission should grant the Petitions for Reconsideration, and begin the process of allowing all interested parties to make their cases to the Commission in a normal rule-making procedure. We appreciate this opportunity to comment and look forward to working with the Commission to develop final rules that do not unnecessarily and unduly restrict community banks from conducting important lending and other financial services activities. Should you have any questions about our recommendations, please contact Janet Frank at 202-857-3129 or via email at jfrank@acbankers.org or the undersigned at 202-857-3121 or via email at cbahin@acbankers.org.

Sincerely,



Charlotte M. Bahin
Senior Vice President
Regulatory Affairs

⁴ 68 Fed. Reg. 4580 (Jan. 29, 2003).